83-403

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN L. SASSCER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the District Court err by failing to instruct the jury that the Petitioner could have thought that he amended his returns to conform with the requirements of the IRS and therefore did not willfully fail to file returns?

2. Did the Court of Appeals err when it affirmed the ruling and instruction of the District Court that the Petitioner had not validly claimed his fifth amendment privilege on the 1976 and 1977 Federal Income Tax Returns or on any other amendatory document relating to such returns?

3. Did the Court of Appeals err when it affirmed the ruling and instruction of the District Court that the Petitioner had not provided sufficient financial data on his Federal Income Tax returns?

4. Did the Court of Appeals err in affirming the ruling of the District Court that the Internal Revenue Service did not accept the Petitioner's 1976 and 1977 Amended Federal Income Tax Returns as well as the ruling that there cannot be a curative filing by amendment accepted thereafter by the IRS?

LIST OF PARTIES

John L. Sasscer

Petitioner

V.

United States of America

Respondent

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TABLE OF AUTHORITIES

Cases

OPINION BELOW

The Opinion of the Court of Appeals (Appendix A herein) is not reported.

JURISDICTION

The Opinion of the Court of Appeals was entered on July 12, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

26 U.S.C. Section 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulation made under authority thereof to make a return (other than a return required under authority of Section 6015 or Section 6016), keep any records, or supply any

information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulation, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

STATEMENT OF THE CASE

A. Nature of the Proceedings Below

On July 29, 1982, a two count Indictment against Petitioner John L. Sasscer was returned by the Grand Jury for the District of Maryland charging that in the calendar years of 1976 and 1977 Mr. Sasscer had failed to file Federal Income Tax Returns in violation of 26 U.S.C. Section 7203. On September 10, 1982, after the Petitioner had been arraigned and pled "Not Guilty" the Petitioner filed a Motion to Dismiss the Indictment for lack of jurisdiction. Thereafter, on September 14, 1982, the Petitioner filed a Memorandum in Support of his Motion to Dismiss, and, on September 20, 1982, the Respondent filed a Memorandum in Opposition to the Appellant's Motion to Dismiss.

On September 27, 1982, Chief Judge Frank A. Kaufman, of the United States District Court for the District of Maryland, filed a Memorandum and Order denying the Appellant's Motion to Dismiss. Subsequently, on November 29, 1982, Chief Judge Frank A. Kaufman filed his Opinion in support of his Order denying the Appellant's Motion to Dismiss.

On October 18, 1982, the case came on for trial before the Honorable Frank A. Kaufman, Chief Judge, and a jury. On October 20, 1982, the Petitioner made an oral Motion for a Judgment of Acquittal at the conclusion of the Respondent's case-in-chief. This Motion was denied by Chief Judge Frank A. Kaufman. The Petitioner renewed his Motion for Judgment of Acquittal at the conclusion of all the evidence and this action was also denied by Chief Judge Frank A. Kaufman.

Thereafter, counsel made closing arguments, the Judge instructed the jury and the jury returned a verdict of "guilty" as to both Counts of the Indictment charging the Petitioner with willful failure to file his Federal Income Tax Returns for the calendar years 1976 and 1977. Thereafter, on December 7, 1982, Chief Judge Frank A. Kaufman sentenced the Petitioner to imprisonment for a period of one year as to each Count, said terms of imprisonment to run concurrently, making a total period of imprisonment of one year. Chief Judge Frank A. Kaufman also ordered the Petitioner to pay a fine in the sum of Ten Thousand Dollars as to each Count, plus costs; said fine to be non-cumulative, making a total fine of Ten Thousand Dollars.

Thereafter, the Petitioner's conviction in the District Court was appealed to

the United States Court of Appeals for the Fourth Circuit. The case was argued on June 10, 1983 and the Court in a per curiam opinion decided on July 12, 1983, that the Petitioner's claims lacked merit. Accordingly, the judgment of the District Court was affirmed.

B. Statement of the Facts

On or about March 26, 1977, John L. Sasscer, the Petitioner, signed and filed a U.S. Individual Income Tax Return for 1976. On the return form he wrote his social security number; indicated that he could not remember his wife's social security number, and he claimed four exemptions including himself, his wife, as well as two dependents, his son and his mother. He did not complete any financial information on the return. Instead, in lines 14 through 16 and in lines 18 through 22 and line 25, there

were preprinted two asterisks, which made reference to a footnote at the bottom of the first page. The two-starred footnote reads:

> This means specific objection is made under the 5th Amendment, U.S. Constitution, to the question as to Federal Reserve Notes, and that similar objection is made to the question under the 1st, 4th, 7th, 8th, 9th, 10th, 13th, 14th and 16th Amendments.

Mr. Sasscer based his preparation of the 1976 Federal Income Tax form on his understanding of the United States Supreme Court's decision in the case of Garner v. United States, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976) and upon the advice of a Maryland Attorney, Andrew Groszer (T. 313, 314 and 315, 370-373) concerning an individual taxpayer's right to plead the 5th Amendment on his

Federal Income Tax Return.

Thereafter, by letter dated June 24, 1977, (IRS Form RSC-664), Mr. Sasscer was notified, in part, by Norman E. Morrill, Director of the Internal Revenue Service Center, Mid-Atlantic Region, that:

> The U.S. Individual Return form we received from you for the above year (1976) is not acceptable as an income tax return because it does not contain information required by law, and it does not comply with Internal Revenue Code requirements.

In response to Mr. Morrill's letter of June 24, 1977, Mr. Sasscer wrote him a letter, dated July 5, 1977, stating that he, Sasscer, is willing to re-file the return, or to amend it, if shown how he can do it without waiving his Constitutional rights. The IRS never responded to this letter.

Thereafter, on or about April 13, 1978, Mr. Sasscer signed and filed with the Internal Revenue Service a pre-printed 1040 U.S. Individual Income Tax Return for the calendar year 1977, which was completed in the same manner as Mr. Sasscer's 1976 Federal Income Tax submission.

On or about June 21, 1978, Mr. Sasscer received another IRS form 664 from Mr. Morrill of the IRS Service Center, Mid-Atlantic Region, advising him that the U.S. Individual Income Tax form received from him was not acceptable as an income tax return.

By letter dated June 27, 1978, Mr. Sasscer again wrote to Mr. Morrill offering to amend or to re-file if shown how to do so without waiving his Constitutional rights. This letter was also never answered.

Thereafter, in November, 1978,

Dennis Bruce Riley, a Special Agent of the IRS Criminal Investigation Division, traveled to the business location of Mr. Sasscer where he met Mr. Sasscer. Mr. Riley advised Mr. Sasscer that he was under investigation concerning his 1976 and 1977 income tax returns and further advised Mr. Sasscer of his Fifth Amendment Constitutional rights (T. 231). Mr. Riley had a tape recorder, and after having read Mr. Sasscer his Fifth Amendment rights, indicated that he wanted Mr. Sasscer to go inside and to take a taped statement from him (T. 396). Mr. Sasscer declined to make such a statement.

Mr. Riley told him that if he had any questions or problems relating to his 1976 and 1977 returns, he could contact Mr. Riley. Since this was the first response that Mr. Sasscer had had

from the IRS with any indication of any possibility of getting help, Mr. Sasscer wrote to Mr. Riley seeking the answers to certain questions (T. 398, Defendant Exhibit #15) such as why the 1976 and 1977 returns were unacceptable and whether the IRS would grant Mr. Sasscer immunity from prosecution in return for the information they seek. Mr. Sasscer was never given immunity nor did he ever receive a response to his letter to Mr. Riley (T. 398).

On another visit in January, 1979, Mr. Riley suggested that Mr. Sasscer write to his Congressman.

As a result of Mr. Riley's suggestion, on or about February 17, 1979, Mr. Sasscer wrote to Senator Sarbanes (Defendant's Exhibit #17) posing questions as to how he could file and submit the requisite information without waiving his Constitutional

rights. No satisfactory answer resulted. (T. 400).

In January, 1979, Mr. Sasscer again sought advice from Mr. Andrew Groszer, a Maryland attorney, explaining that he had written to Special Agent Riley without receiving any response and also indicating that he did not believe the IRS was going to grant him immunity. Mr. Sasscer further indicated to Mr. Groszer that he did not know how to settle the matter. He explained to Mr. Groszer that he had hoped the IRS would grant him immunity so that he could submit the information and pay the tax (T. 402).

Mr. Groszer recommended that Mr. Sasscer send the IRS a letter along with the tax due, including interest accumulated up to that time. Accordingly, Mr. Groszer dictated a letter for Mr. Sasscer. This

letter was sent to the IRS along with two bank checks for the years 1976 and 1977 (Petitioner's Exhibit #2). The check submitted for 1976 amounted to $2,516.37 and the check for 1977 amounted to $3,988.65.

Thereafter, Mr. Sasscer received two letters from the IRS dated August 14, 1979, acknowledging the receipt of each payment for 1976 and 1977 and stating that "Although we have not made a final determination of your liability for this period, we will accept $2,516.37/$3,988.65 of your payment as a cash bond for payment of an amount that may be assessed later, if you wish us to do so."

The money has been retained by the IRS and it appears that Mr. Sasscer overpaid the tax, and accrued interest, for both years (T. 407, 408) because he

used the wrong table.

Thereafter, Mr. Sasscer learned that the IRS had classified him as a "tax protester" (T. 408) because of printed material he had sent in the initial filings in 1977 and 1978. Accordingly, Mr. Sasscer contacted Mr. Groszer, his legal advisor, about the "tax protest" designation (T. 409). As a result of his discussions with Mr. Groszer, it was decided to file amended returns (T. 410). Thereafter, Mr. Sasscer filed amended returns for 1976 and 1977 and simultaneously sent the IRS letters, dated October 19, 1979 concerning each return. The purpose of each of these letters was to explain that he was not a tax protester in that he "was not protesting the actions of any part of the U. S. Government nor the spending of tax money."

Moreover, Mr. Sasscer pointed out in each letter that he had paid the IRS which had accepted the moneys sent. Mr. Sasscer concluded each letter by expressing the hope that his actions would settle the matter of the acceptability of his tax returns for 1976 and 1977. Finally, he wrote "If I do not receive a letter from your office, indicating otherwise, I shall assume that all is satisfactory."

Mr. Sasscer did not receive any Form 664 letter or any other correspondence from the IRS that the documents he had filed and the money he had sent was not acceptable. (T. 412).

Thereafter, in June, 1980, he went with two other persons to the IRS office in Baltimore to meet with IRS officials in the Problem Resolution Officer's office. They asked the IRS, how can a citizen submit the information the IRS

requests without waiving his Constitutional rights. The IRS officials did not respond or explain (T. 414).

Two years later, on July 29, 1982, a two Count Indictment was returned against Mr. Sasscer charging him with failure to file Federal Income Tax returns for 1976 and 1977 in violation of 26 U.S.C. Section 7203.

REASONS FOR GRANTING THE WRIT

1. There is a conflict in the Circuit Courts as to what constitutes a valid tax return. According to United States v. Verkuilen, 690 F.2d 648, 654 (7th Cir. 1982); United States v. Francisco, 614 F.2d 617, 618 (8th Cir. 1980); United States v. Edelson, 604 F.2d 232, 234 (3rd Cir. 1979); United States v. Brown, 600 F.2d 248, 250 (10th Cir. 1979) the test of a valid tax return is whether it contains sufficient information from which tax liability can be calculated.

Alternatively, what constitutes a valid tax return according to the Seventh Circuit is determined by whether there was an honest and reasonable intent to supply the information required by the tax code. United States v. Moore, 627 F.2d 830, 834-5 (7th Cir. 1980).

A. The Petitioner takes the position

that the documents he provided the Internal Revenue Service for 1976 and 1977 contain sufficient information from which tax liability can be calculated. Assuming he did not, however, the jury should have been instructed, under the Moore ruling, that even if the Petitioner disagreed with the Internal Revenue Law he could still have filed an appropriate return by making an honest and genuine endeavor to satisfy the law.

Instead, Petitioner's proposed jury instruction No. 13 was rejected by the District Court. This instruction was a variation of an instruction that the Petitioner could still have filed an appropriate return by making an honest and genuine endeavor to satisfy the law. Indeed, there was evidence of such endeavors by the Petitioner. Thus, the Internal Revenue Service did not respond to the

Petitioner's letters of October 19, 1979, which set forth the Petitioner's attempt to conform his conduct to the law.

The letters conclude:

> I hope that this will settle the matter of the acceptability of my tax return for the year 1976/1977. If I do not receive a letter from your office, indicating otherwise, I shall assume that all is satisfactory. (Government Exhibits #15 and 17).

Petitioner Sasscer never received a response to these letters from the IRS. In view of the Petitioner's efforts to comply with the tax law and the IRS' acceptance of monies in payment of his 1976 and 1977 Federal Income Taxes, there is sufficient evidence in the record to entitle the Petitioner to appropriate instructions on the foregoing

"honest and genuine endeavor to satisfy the law" theory of defense. United States v. Phillips, 217 F.2d 435, 441-3 (7th Cir. 1954). The failure of the District Court to give such an instruction and his rejection of defense counsel's proposed instruction no. 13 constitutes reversible error.

Moreover, recently the Supreme Court of South Carolina overturned the conviction of a defendant charged with "failure to provide information" on his State income tax form on the ground that, inter alia, "(a)lthough (he) requested instructions for properly completing his tax return, the Commission never responded to his request. . ." State v. Goodman, unpublished opinion, July 27, 1983, No. 83-MO-143. When Mr. Goodman filed his State and Federal tax returns for 1980, he responded to many of the questions on

the form by claiming his 4th and 5th Amendment Constitutional Rights.

B. The District Court also refused to instruct, as requested by the Petitioner's counsel, that reference to the Petitioner's dealings with the Internal Revenue Service be included in the instructions to the jury. Those dealings would have indicated to the jury that the Petitioner did not have the specific intent required by the Moore interpretation of 26 U.S.C. Section 7203. In particular, the Petitioner's letters to IRS official Norman Morrill indicate that he did not consider himself to be a tax protester. Thus, he wrote, in pertinent part, that:

> I noticed that on the form the block entitled; "tax protest case", has been marked with an "x". This concerns me greatly because I was not protesting the action of any part of the U.S. Government, nor the spending of

> tax money. I feel that the significance of the attachments in my previous return may have been misunderstood, as no protest was intended. . .

Further, the District Court ignored the Petitioner's counsel's attempt to amend jury instructions by including a reference to the acceptance by the IRS of returns and money. Such an instruction would have demonstrated the Petitioner's lack of specific criminal intent.

Rather, by merely instructing the jury only to consider whether "the defendant formed a good faith understanding of the law and then acted in accordance with it", the District Court misdirected the jury. The District Court should have indicated that ". . .If the Internal Revenue Service does not object and accepts the returns, . . .the returns or the documents that have been filed (could

be) acceptable returns at least from the good-faith, subjective viewpoint of the defendant, and therefore evidence of his good faith." (Proposed instruction advanced by Petitioner's counsel).

For the foregoing reasons the District Court erred by failing to instruct the jury that the Petitioner could have thought that he amended his returns to conform with the requirements of the IRS and therefore did not willfully fail to file returns.

2. The Court of Appeals erred when it affirmed the ruling and instruction of the Maryland District Court that the Petitioner had not validly claimed his Fifth Amendment privilege on his 1976 and 1977 Federal Income Tax Returns or on any other amendatory document relating to such returns.

The District Court instructed the jury, in pertinent part, that:

> . . .In addition, the taxpayer is not the final arbiter of the Fifth Amendment privilege. The privilege must be specifically claimed on a particular question set forth in the return.
>
> Thus, the taxpayer must, in order validly to assert his right against self-incrimination, assert it as to one or more specific items, otherwise, the taxpayer forever waives that privilege as to that one tax return.
>
> In addition, the defendant must make a reasonable statement on the return itself or in an accompanying document with respect to how the disclosure of the information asked for in the return could possibly incriminate him (T. 604).

Further, in response to the Petitioner's renewed Motion for a Judgment of Acquittal at the conclusion of all the evidence,

the District Court ruled that there was not a valid return filed in either year for several reasons, one of which was that "you do not validly claim a self-incrimination privilege on a return on the blanket kind of conclusory basis that was followed by the taxpayer in this case." (T. 493).

The applicable law is that the privilege against self-incrimination, if validly exercised, is an absolute defense to a Section 7203 prosection for willful failure to file an income tax return. Garner v. United States, 424 U.S. 648, 662-63, 96 S.Ct. 1178, 1186-87, 47 L.Ed. 2d 370 (1976). Moreover, according to Garner, a self-incrimination objection to an income tax return must be raised at the time of filing. Further, an objection may be raised only in response to specific questions as to the return.

Garner, supra, United States v. Neff, 615 F.2d 1235, 1238 (9th Cir. 1980).

In our case, the Petitioner, like Neff, exercised his Fifth Amendment privilege on his 1976 and 1977 Federal Income Tax Returns in response to specific questions asked in the returns by marking line 9 through 16, 18, 20-22 and 25 with two asterisks, which indicate in a footnote at the bottom of the first page of each return that he was exercising his Fifth Amendment privilege. Thus, it was error for the District Court to imply in the instructions that the Petitioner had not asserted his right against self-incrimination as to one or more specific items.

Moreover, the applicable decisions do not indicate, as the District Court instructed, that the Defendant (Petitioner) must make a reasonable statement on the return itself or in an accompanying

document with respect to how the disclosure of the information asked for in the return could possibly incriminate him. Accordingly, this instruction was erroneous and was probably causally related to the jury's finding that the Petitioner had willfully failed to file returns for 1976 and 1977.

Further, it was error for the District Court to rule that "you do not validly claim a self-incrimination privilege on the blanket kind of conclusory basis that was followed by the taxpayer in this case." (T. 493). However, as is made clear, in United States v. Sullivan, 274 U.S. 295, 263-64, 47 S.Ct. 607, 71 L.Ed. 1037 (1927) and followed by United States v. Barnes, 604 F.2d 121, 148 (2nd Cir. 1979), the right to make a valid claim of privilege is available even as to the amount of a taxpayer's income, as

well as any other item on the return which could legitimately cause self-incrimination.

Thus, contrary to the District Court's rulings and instructions, the Petitioner, mechanically, validly exercised his privilege against self-incrimination on his tax returns for 1976 and 1977. Further, by his subsequent amended filings and correspondence to the IRS, the Petitioner made it absolutely clear that he was making specific Fifth Amendment objections to questions on the tax returns.

3. The Court of Appeals erred when it affirmed the ruling and instruction of the District Court that the Petitioner had not provided sufficient financial data on his Federal Income Tax Returns. The District Court instructed the jury that even where a Defendant had valid Fifth Amendment protection against revealing

the source of his income, the Defendant would still be required to disclose the amount of such income, and the failure to disclose the amount of such income, would not be protected by the Fifth Amendment. The Court went on to instruct the jury, as a matter of law, that the Defendant's claim of a Fifth Amendment privilege on the returns he filed with the Internal Revenue Service in 1977 and 1978, or the amended returns which he filed in 1979, was not valid, because the Defendant (Petitioner) did not set forth on or in any return or document which he filed with the Internal Revenue Service with regard to the years 1976 and 1977, any information as to the specific items of the Defendant's gross income or deductions or credits for either of the years. (T. 604, 605).

In denying the Petitioner's Motion

for Judgment of Acquittal made at the conclusion of the prosecution's case, the District Court ruled that the Petitioner's letter of October, 1979 did not contain sufficient information, taken together with any document filed prior to or after October, 1979, so as to constitute a valid return for either year or valid returns for the two years involved, 1976 and 1977. (T. 274).

Contrary to the Court's instructions, case law indicates that there are circumstances where taxpayers have the right to exercise their Fifth Amendment privilege against revealing not only the source, but also the amount of their income. Thus, as previously noted, in United States v. Sullivan, supra, the right to make a valid claim of privilege is available even as to the amount of a taxpayer's income as well as any other item on the

return which could legitimately cause self-incrimination. Accordingly, it is not correct to instruct the jury that a taxpayer can never exercise his Fifth Amendment right against revealing the amount as well as the source of his income.

Concerning the question of how much financial information must a taxpayer ordinarily disclose on his tax return for it to be a valid return, the Court's decision in United States v. Moore, 627 F.2d 830, 835 (7th Cir. 1980) provides a test that:

> The mere fact that a tax could be calculated from information on a form, however, should not be determinative of whether the form is a return. Porth relied in part on earlier Supreme Court cases which considered the definition of a return in another context. These cases indicate that it is not enough for a form to contain

> some income information; there must be an honest and reasonable intent to supply the information required by the tax code. (citations omitted). In Zellerbach Paper Co. v. Commissioner, 293 U.S. 172, 180, 55 S.Ct. 127, 131, 79 L.Ed. 2nd 264 (1934), it was said that:
>
> "Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law". (citation omitted).

Applying this test to our case, it is clear the Petitioner had an honest and reasonable intent to supply the information required by the tax code. Thus, when the Petitioner was unable to secure instructions from the IRS as to how he could file his tax returns without waiving his Fifth Amendment privilege and after it became apparent in January, 1979 that

the IRS was not going to grant him immunity, he again sought the advice of Andrew Groszer, a Maryland attorney.

Mr. Sasscer, the Petitioner, told Mr. Groszer that he wanted to settle the matter of paying his taxes while at the same time preserving his Fifth Amendment rights.

Accordingly, Mr. Groszer recommended that Mr. Sasscer send the IRS a letter, dated January 30, 1979, along with the tax due, including interest accumulated up to that point. Mr. Groszer even dictated a letter which Mr. Sasscer sent to the IRS (Government Exhibit #9). According to Frank Earl Ecker, C.P.A. who examined Mr. Sasscer's financial records for 1976 and 1977 as well as Mr. Sasscer's letter to the IRS, dated January 30, 1979, and the IRS' summary schedule of taxable income for 1976 and taxable

income for 1977 (Government Exhibit #34) and John L. Sasscer, Summary Schedule of Net Tax Liability for 1976 and 1977, Mr. Sasscer overpaid his tax (T. 470). Indeed, according to Mr. Ecker's uncontradicted testimony, Mr. Sasscer actually overpaid his income tax for 1976 by $318.00, using the filing status of married, filing separate and using itemized deductions in determining the tax. By the same method, Mr. Ecker testified Mr. Sasscer overpaid his 1977 tax by $818.00. Mr. Ecker's calculations are set forth in a letter dated September 24, 1982 to Mr. Sasscer (Defendant's Exhibit #20).

Mr. Ecker testified further that from Mr. Sasscer's figures in the January 30, 1979 letter to the IRS (Government Exhibit #9) using the 1976 IRS tax table and also the 1976 tax tables (Defendant's Exhibit #20) is the calculation that he

made in reference to working backwards when given tax, filing status and exemption for the year to calculate taxable income (T. 472).

Thus, applying the United States v. Moore, supra, test in light of the Petitioner's concerns about being able to take the Fifth Amendment, the January 30, 1979 letter from Mr. Sasscer to the IRS (Government Exhibit #9), taken together with all the other documents he filed represents an honest and genuine effort to satisfy the law bearing in mind that perfect accuracy or completeness is not necessary to rescue a return from nullity.

4. The Court of Appeals erred in affirming the ruling of the District Court that the Internal Revenue Service did not accept the Petitioner's 1976 and 1977 Amended Federal Income Tax Return as well as the ruling that there cannot

be a curative filing by amendment accepted thereafter by the IRS.

In overruling the Petitioner-Defendant's Motion for Judgment of Acquittal at the conclusion of the prosecution's case, the Court, in effect, ruled that the IRS had not accepted the Petitioner's tax return and that there cannot be a curative filing by amendment of tax returns. The Court said that IRS regulations require each taxpayer to carefully prepare his return and set forth fully and clearly the information required to be included therein. Further, citing the IRS Regulation at 26 CFR 1.6011-1, the District Court said that returns which have not been so prepared will not be accepted. (T. 294).

As to the question of whether there could be a curative filing by amendment, the District Court remarked that there does not seem to be any specific statutory

provision, but the IRS has a matter of administration, recognized and accepted amended returns for limited purposes, but the treatment has not gone beyond an exercise of internal agency discretion citing Koch v. Alexander, 561 F.2d 1115, 1117 (4th Cir. 1977) (T. 295,296). In addition, the District Court ruled, as a matter of law, that there was no valid return filed and/or accepted. (T. 504).

While Koch v. Alexander, supra, at 1117, does apply a rule of whether internal agency (IRS) discretion has been abused in determining whether or not the Agency should have recognized and accepted an amended return, the evidence shows that the IRS abused its discretion in the Petitioner's case.

Thus, it is clear that an amended return can be filed after the due date, but that the IRS does not have to accept

the return, unless a refusal to accept amounts to an abuse of discretion. See also, Lion Associates, Inc. v. United States, 515 F.Supp. 550, 552, 553 (E.D. Pa. 1981).

The Petitioner's position is that the IRS abused its discretion in not accepting his 1976 and 1977 returns as well as his amended 1976 and 1977 returns including the letters relating thereto, addressed to the Director, IRS Service Center, and dated October 19, 1979, plus his letter of January 30, 1979.

The IRS abused its discretion in not accepting Mr. Sasscer's filing relating to his 1976 and 1977 Federal Income taxes, because the IRS did not follow its own procedure in notifying Mr. Sasscer that his amended 1976 and 1977 returns were not acceptable by sending him a letter form 664 as the

Agency had done with respect to his initial filings of his 1976 and 1977 returns. (Government Exhibits #5 and #7).

Moreover, the IRS abused its discretion in accepting the money sent by Mr. Sasscer in payment of his 1976 and 1977 Federal Income tax plus accrued interest for late payment for each year. These funds were sent by Mr. Sasscer along with his letter of January 30, 1979, addressed to Norman Morrill, Director of Service Center, IRS, Philadelphia, Pennsylvania (Government Exhibit #9).

Further, the IRS abused its discretion in not accepting the Sasscer documents (and by recommending to criminal prosecution) by not responding to Petitioner's letters of October 19, 1979, which set forth the problems as the Petitioner sees them, and also describes what he has done to

resolve the problems and to settle the matter. The letters conclude by stating:

> I hope that this will settle the matter of the acceptability of my tax return for the year 1976/1977. If I do not receive a letter from your office, indicating otherwise, I shall assume that all is satisfactory (Government Exhibit #15 and #17).

The Petitioner never received a response to these letters from the IRS. It was an abuse of discretion for the IRS to fail to respond and not to accept the returns in the circumstances of this case in view of the efforts the Petitioner made to comply and the IRS' acceptance of monies in payment of his 1976 and 1977 Federal Income taxes.

Further, since the standard of IRS acceptance of amended filing of tax returnss is whether the IRS abused its discretion, discussed above, it was

error for the District Court to instruct the jury:

> The late filing of any amendment to a tax return does not by itself wipe out a violation of the law by a failure timely to file a tax return, unless there is justification for such failure and the Internal Revenue Service had arbitrarily refused to accept such justification and permit the late filing (T. 607).

Thus, the standard is simply "abuse of discretion" a less rigorous standard than "arbitrary refusal to accept".

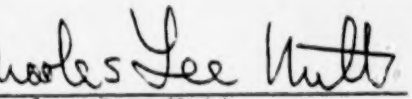
Accordingly, the District Court rulings and instruction with respect to IRS acceptance of the Petitioner's returns were erroneous.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition

for Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

A1

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 82-5343

UNITED STATES OF AMERICA

Appellee

v.

JOHN L. SASSCER

Appellant

Appeal from the United States District Court for the District of Maryland at Baltimore. Frank A. Kaufman, Chief District Judge.

Argued: June 10, 1983 Decided: July 12 1983

Before HALL, SPROUSE and ERVIN, Circuit Judges.

Charles Lee Nutt (Clements & Nutt on brief) for Appellant;
Elizabeth H. Trimble, Assistant United states Attorney (J. Frederick Motz, United States attorney on brief) for Appellee.

PER CURIAM:

John L. Sasscer appeals from his two-count conviction of willful failure to file federal income tax returns for the calendar years 1976 and 1977 in violation of 26 U.S.C. Section 7203.

On appeal, Sasscer's primary allegation is that the district court erred in not granting his motion to dismiss the indictment on the ground that the court lacked jurisdiction to consider criminal violations of the federal income tax laws as set forth in Title 26 U.S.C. We find this argument to be totally meritless. Therefore, we agree that the denial of Sasscer's motion to dismiss was correct for the reasons stated by the district court.

Furthermore, upon consideration of the written briefs and argument of counsel,

we conclude that Sasscer's other claims also lack merit. The record reveals that there was ample and sufficient evidence to support the jury's verdict of guilty beyond a reasonable doubt. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES OF AMERICA	CRIMINAL NO. K82-00324
v.	(Failure to file Tax Returns)
JOHN L. SASSCER	26 U.S.C. Section 7203)

INDICTMENT

The Grand Jury for the District of Maryland charges:

During the calendar year 1976 in the State and District of Maryland,

JOHN L. SASSCER,

a resident of Baltimore, Maryland, had and received gross income of $16,800.00, more or less, that by reason of such income he was required by law following the close of calendar year 1976, and on or before April 15, 1977, to make an income tax return to the District Director of Internal Revenue, at Baltimore, Maryland, or to the Director, Internal Revenue Service Center, Philadelphia, Pennsylvania, stating specifically the items of his

gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did willfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

26 U.S.C. Section 7203

And the Grand Jury for the District of Maryland further charges:

During the calendar year 1977 in the State and District of Maryland,

JOHN L. SASSCER,

a resident of Baltimore, Maryland, had and received gross income of $18,150.00, more or less; that by reason of such income he was required by law following the close of calendar year 1977, and on or before April 15, 1978, to make an

income tax return to the District Director of Internal Revenue, at Baltimore, Maryland, or to the Director, Internal Revenue Service Center, Philadelphia, Pennsylvania stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did willfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

26 U.S.C. Section 7203

J. Frederick Motz
United States Attorney

A TRUE BILL:

Foreman

No. 83-403

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN L. SASSCER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

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No. 83-403

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is a tax protester case. Petitioner seeks review of his conviction for willfully failing to file income tax returns, asserting that the district court improperly instructed the jury.

1. Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of willfully failing to file income tax returns for 1976 and 1977, in violation of 26 U.S.C. 7203. Petitioner was fined a total of $1,000 and sentenced to concurrent one-year prison terms. The court of appeals affirmed (Pet. App. A1-A3).

2. The evidence at trial established the following facts: During the years 1976 and 1977, petitioner earned enough gross income to require him to file federal income tax returns (C.A. App. 139-140; Tr. 473-474). Petitioner filed Forms 1040 with the Internal Revenue Service (IRS)

purporting to be his federal tax returns for each year, but he failed to include thereon any information except his name, address, and family status. On each line requesting tax-related information (such as gross income, deductions, taxable income or tax due), petitioner responded that "objection is made to the question" under the 1st, 4th, 5th, 7th, 8th, 9th, 10th, 13th, 14th and 16th Amendments (C.A. App. 4-5, 42-43). Each Form contained the notation that it was "filed under protest." Attached to each Form 1040 were 30 pages of materials taken from a tax-protest kit, including dissertations on the metallic content of coins, affidavits expressing "considerable confusion as to what is a 'dollar,' " and copies of newspaper articles bearing titles like "Big Brotherism Grows" (*id.* at 6-39, 49-73).

The IRS notified petitioner shortly after receiving his 1976 and 1977 submissions that they were not acceptable as income tax returns because they did not contain the information required by law (C.A. App. 40-41). Petitioner replied that he was willing to resubmit or amend the forms if the IRS would indicate how he could do so without waiving his constitutional rights (*id.* at 74, 79). In November 1978, an IRS special agent advised petitioner that he was under investigation concerning his 1976 and 1977 tax liabilities (Tr. 231). The following January petitioner sent the IRS checks purporting to represent payment of those liabilities, but furnished no financial information or explanation as to how the amounts were calculated (C.A. App. 80). The IRS notified petitioner in August 1979 that his checks would be held as a cash bond against the tax that would ultimately be assessed against him for 1976-1977, making it clear that part or all of the bond would be returned to him upon his request (*id.* at 93-96). Petitioner subsequently requested that a portion of the payments be returned (*ibid.*).

In October 1979 petitioner submitted "amended" Forms 1040 for 1976 and 1977 (C.A. App. 97-127). These Forms, like the Forms petitioner submitted earlier, contained no financial information from which a tax liability could be determined; they differed from the earlier versions only in that the words "Object — Self Incrimination" were inserted on virtually every line (*ibid.*). The attachments were somewhat different, having been taken from a different tax-protest kit; they included a standardized "memorandum" purporting to justify a taxpayer's refusal, on Fifth Amendment grounds, to provide any tax information.

Petitioner was indicted and convicted for willful failure to file income tax returns for 1976-1977. The Fourth Circuit affirmed his conviction in an unpublished order, holding that "there was ample and sufficient evidence to support the jury's verdict of guilty beyond a reasonable doubt" (Pet. App. A3).

1. Petitioner contends (Pet. 24-30) that his 1976-1977 submissions constituted "tax returns," either on the theory that they "contain[ed] sufficient information from which [his] tax liability [could] be calculated" or that they represented "an honest and genuine endeavor to satisfy the law," and that the jury should have been so instructed. This contention is frivolous. The courts of appeals have uniformly held that a Form 1040 containing no financial or tax-related information whatsoever is not a "tax return" and that a person who submits such a document can properly be convicted for willful failure to file. *E.g., United States* v. *Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982); *United States* v. *Francisco*, 614 F.2d 617, 618 (8th Cir. 1980); *United States* v. *Edelson*, 604 F.2d 232, 234 (3d Cir. 1979). And there is no support for petitioner's assertion that documents of the sort he submitted can be rescued from nullity and transformed into "tax returns" if a taxpayer can

somehow show that they represent "honest and genuine endeavor[s] to satisfy the law."[1] Even if this assertion were correct, there was absolutely no evidence that petitioner's actions were "honest" or "genuine" here. This Court has noted that "a self-incrimination claim against every question on the tax return * * * would be virtually frivolous." *Albertson* v. *SACB*, 382 U.S. 70, 78-79 (1965). In any event, the trial judge properly instructed the jury that willfulness is a voluntary and intentional violation of a known legal duty; in convicting petitioner, the jury plainly concluded that he had not made an "honest and genuine endeavor" to satisfy his filing obligation.

2. Petitioner contends (Pet. 30-35) that he made a valid claim of his Fifth Amendment privilege and that the trial judge should have so instructed the jury. Petitioner appears to acknowledge the well-established proposition that the Fifth Amendment privilege must be invoked selectively, in response to specific questions to which truthful answers would tend to incriminate; it does not license a wholesale refusal to fill out a tax form. *Marchetti* v. *United States*, 390 U.S. 39, 50 (1968); *Albertson*, 382 U.S. at 78-79. Petitioner's assertion (Pet. 33) that his Fifth Amendment claim was properly made "in response to specific questions" is a verbal quibble; a claim is not made "specifically" when asserted with respect to each of the 60 questions requesting financial information on a tax form.[2]

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[1]Petitioner's reliance (Pet. 24-27) on *United States* v. *Moore*, 627 F.2d 830 (7th Cir. 1980), is misplaced. The Seventh Circuit there held that a taxpayer whose Form 1040 contained *some* tax-related information could nevertheless be prosecuted for willful failure to file if his actions did *not* constitute an honest and genuine endeavor to satisfy the law.

[2]Contrary to petitioner's contention (Pet. 37-38), *United States* v. *Sullivan*, 274 U.S. 259 (1927), does not stand for the proposition that "the right to make a valid claim of [Fifth Amendment] privilege is

3. Petitioner contends (Pet. 28-30, 42-49) that the trial judge erred in failing to instruct the jury that it should consider petitioner's filing of "amended" Forms 1040, as well as his prolific correspondence with the IRS, in determining whether his failure to file 1976-1977 tax returns was willful. The crime of willful failure to file a return, however, is complete once the due date passes; "the intent to report the income and pay the tax sometime in the future does not vitiate the willfulness required by" Section 7203. *Sansone* v. *United States*, 380 U.S. 343, 354 (1965). Since the jury was required to consider petitioner's good faith, or lack of it, at the times his 1976-1977 returns were due to be filed, his later efforts to comply with the law, if such they were, were immaterial. *E.g., United States* v. *O'Connor*, 433 F.2d 752, 753 n.1 (1st Cir. 1970); *United States* v. *Greenlee*, 380 F. Supp. 652, 660 (E.D. Pa. 1974), aff'd, 517 F.2d 899, 903 (3d Cir.), cert. denied, 423 U.S. 985 (1975). And even if amended returns could be regarded as relevant in assessing the willfulness of a taxpayer's original failure to file, petitioner's amended documents were not "tax returns" any more than his original submissions were. They, like their predecessors, contained no tax-related information whatsoever and made a mere blanket assertion of the Fifth Amendment privilege.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1983

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available even as to the amount of a taxpayer's income." This Court in *Sullivan* said (*id.* at 263-264) that "[i]t would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."